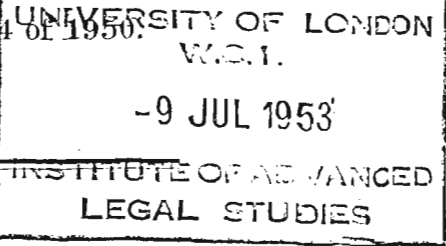


9, 1951



In the Privy Council.

ON APPEAL
FROM THE SUPREME COURT OF CANADA.

IN THE MATTER of the Habeas Corpus Act, Revised Statutes of Ontario 1937, chapter 129 and amendments thereto,

and

IN THE MATTER of an Application of Evelyn McKee as next friend and legal guardian for possession of her son Terry Alexander McKee.

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BETWEEN

MARK T. McKEE (Defendant) - - - - - *Appellant*

AND

EVELYN McKEE (Plaintiff) - - - - - *Respondent.*

Case for the Appellant.

RECORD

1. This is an appeal from a judgment of the Supreme Court of Canada dated the 6th day of June, 1950, which by a majority of four judges (Kerwin, Estey, Locke and Cartwright JJ., Taschereau, Kellock and Fauteux JJ. dissenting) allowed the Respondent's appeal from a Judgment of the Court of Appeal for Ontario dated the 24th June, 1948, which by a majority (Hogg and Aylesworth, J.J.A., Robertson C.J.O. dissenting) dismissed the Respondent's appeal from an Order of Wells J. dated the 18th October, 1947, that the Appellant be awarded the sole custody of Terry Alexander McKee (hereinafter called "the infant") the infant son of the Appellant and the Respondent born on the 14th July, 1940, and that the Respondent have reasonable access to the infant once a week during reasonable hours.

2. The order of Wells J. had been made on the trial of an issue directed by Smily J. in habeas corpus proceedings by the Respondent who claimed to be entitled to the custody of the infant under an order of the Superior Court of California dated the 1st August, 1945, which by reason of appeals only took effect on the 13th January, 1947. The issue was

I, p. 26

who is to have custody of the infant as between the Respondent and the Appellant. The Respondent by leave moved on the hearing of the issue for custody of the infant under the Infants Act, Revised Statutes of Ontario 1937, chapter 215.

3. The Appellant respectfully submits that the duty of the Court in the habeas corpus proceedings and on the trial of the issue was to consider as the governing if not the sole question the welfare of the infant. To subordinate that consideration to regard for the order of a foreign court or to convenience is, the Appellant contends, contrary to law.

IV, p. 743, ll. 11-14 ;
I, p. 9, ll. 4-13
IV, p. 743, ll. 32-37

I, p. 5, l. 19
IV, p. 743, ll. 19-22

IV, p. 731

IV, pp. 731-738

IV, p. 733, l. 28—
p. 734, l. 31

IV, p. 733, ll. 20-26

IV, p. 736, ll. 1-13

4. In 1933 the Appellant, a United States citizen (then domiciled, 10 as the Appellant submits, in Michigan as he has been at all times until he took up his residence in Ontario in 1946) married the Respondent, also a United States citizen, in the State of Vermont. The infant was born in California on the 14th July, 1940. In December, 1940, the Appellant and the Respondent separated and have not since lived together. On the 4th September, 1941, financial arrangements for the benefit of the Respondent, the infant and a son of the Respondent by a former husband were made by a property settlement agreement executed by the Appellant and the Respondent. The agreement transferred to the Respondent the house in which the parties had resided in California. The agreement 20 contained no express reference to the custody of the infant but provided by clause 5 that the Appellant would not remove the infant from the United States without the written permission of the Respondent, and by clause 10 that in any divorce proceedings neither party would seek any decree at variance with the agreement. The Appellant submits that so far as concerns the infant this agreement has been abrogated by inconsistent provisions in the judgments hereinafter mentioned.

V, p. 855, ll. 1-9

V, p. 855, l. 14

V, p. 855, ll. 16-19

IV, pp. 759-761

IV, p. 760, ll. 18-28

IV, p. 760, ll. 29-33

IV, p. 760, ll. 40-46 ;
p. 734, ll. 32-45

5. On the 18th September, 1941, the Respondent began proceedings for divorce in the Superior Court of California, and on the 28th September, 1942, the Appellant, who had taken up his permanent residence in the 30 State of Michigan where at the time of his marriage and at all material times he had a residence in Port Austin, entered a cross-complaint. The trial took place in October and November, 1942, and on the 20th November, 1942, the custody of the infant was granted to the Appellant by interlocutory order. On the 17th December, 1942, the Respondent's suit was dismissed and a divorce was granted to the Appellant on his cross-complaint. The judgment awarded the custody of the infant to the Appellant but directed that the infant spend three months during each summer with the Respondent. The judgment also confirmed and approved 40 with a variation the property settlement agreement. The amount payable thereunder by the Appellant to the Respondent for the maintenance of the infant was reduced from \$125 per month to \$100 per month during the time the infant was with the Respondent.

V, p. 855, l. 31—
p. 856, l. 14

IV, p. 762, l. 20—
p. 764, l. 29

6. An appeal by the Respondent against this judgment of the 17th December, 1942, was abandoned, but on the 31st May, 1943, the Respondent sought a variation of the order for custody, and on the 10th June, 1943, the Appellant also sought a variation. The judge directed

that the infant spend the period from the 1st July, 1943, to the 30th ~~Sept~~ September, 1943, with the Respondent who was not to remove the infant from California without an order of the Court.

7. On the 20th August, 1943, the Respondent applied for a modification of the order and on the 15th September, 1943, the Appellant filed a cross-application. Both applications were denied but the Respondent was given the care custody and control of the infant for one day in each week from the 1st October, 1943, until the 30th June, 1944, the Appellant being ordered to pay the Respondent's fare from Los Angeles, California to Milwaukee, where the Appellant then was, three times during the period. IV, pp. 766-767
8. The Respondent, in the Circuit Court, Milwaukee, Wisconsin, filed on the 12th January, 1944, a complaint seeking exclusive custody of the infant, and on the 7th July a further complaint alleging that the Superior Court in California had no jurisdiction to grant a divorce, attacking the integrity of the divorce judge, alleging collusion between the attorneys, contesting the findings against her as based on perjured evidence and relying on the property settlement agreement as entitling her to the custody of the infant until he attained his majority. IV, pp. 768-770
IV, pp. 771-794
9. In May, 1945, the Appellant applied to the Superior Court in California for sole custody of the infant, and the Respondent by cross-application also asked for sole custody. On the 29th June, 1945, the Respondent's Wisconsin proceedings were dismissed by consent. On the 1st August, 1945, the Superior Court in California awarded custody of the infant to the Respondent with a right of visitation to the Appellant. The grounds for this order are open to criticism and were criticised by the minority of judges in the Supreme Court of Canada, by reason of inaccuracy and insufficiency to warrant the order. Appeals by the Appellant prevented this order from taking effect until the 13th January, 1947. V, pp. 846-849
V, p. 845
V, p. 848, ll. 17-25
V, p. 928, l. 47—
p. 929, l. 7
V, p. 904, ll. 39-50
10. Meantime from November, 1942, until September, 1946, the infant was in the custody of the Appellant but spent July August and September in each year with the Respondent. From the 30th September, 1946, the infant has been at all times with the Appellant. I, p. 10, l. 42—
p. 11, l. 10
10. On the 26th December, 1946, the Appellant brought the infant to Kitchener, Ontario, but the Respondent did not learn where the infant was until the latter part of February, 1947. The Appellant owns and for several years had owned a farm near Kitchener and many relatives of his first wife live in the neighbourhood. II, p. 357, ll. 29-46
I, p. 55, ll. 16-18
II, p. 356, ll. 17-45
II, p. 355, l. 32—
p. 356, l. 5
11. On the 21st March, 1947, the Respondent obtained from the Supreme Court of Ontario leave to issue a writ of habeas corpus directed to the Appellant and others. On the return to the writ Smily J. gave leave to the Respondent to make an application for the custody of the infant, and directed an issue as to who should have the custody of the infant as between the Respondent and the Appellant, and gave the parties leave to take evidence on commission. The Respondent unsuccessfully sought leave to appeal from the order of Smily J. I, p. 7
I, p. 22, ll. 11-16
I, p. 20, l. 32—
p. 21, l. 3
I, p. 25

I, p. 40, l. 3; p. 26

12. On the opening of the trial of the issue the Respondent filed a notice of motion for the custody of the infant. The trial before Wells J. lasted for thirteen days and the evidence included that given on commission by a number of witnesses in California. By judgment dated the 18th October, 1947, Wells J. awarded the Appellant sole custody of the infant, ordered that the Respondent should have reasonable access to the infant once a week during reasonable hours, and made no order as to costs.

V, p. 857

V, pp. 859-874

V, p. 860, ll. 32-47

13. In his reasons for judgment Wells J. held that after the interlocutory judgment for divorce of the Superior Court of California, the Appellant moved to Wisconsin and then to Michigan where Wells J. held that the Appellant was domiciled before going to and after leaving California if not during his residence there. Wells J. then referred to the proceedings in the United States and held, on the evidence of California law, that when the Appellant brought the infant into Ontario, the infant was even under California law lawfully in the Appellant's custody. 10

V, p. 863, ll. 22-33

V, p. 863, l. 34—
p. 868, l. 25

Wells J. also thought it quite clear that the physical presence of the infant in Ontario clothed the Supreme Court of Ontario with jurisdiction to deal with the matters in issue. He considered the guiding principle under the Infants Act (R.S.O. 1937 c. 215) to be the welfare of the infant. 20

V, p. 868, l. 25—
p. 873, l. 40

He refused to be bound by the orders for custody of the California Courts because the infant was not then either domiciled or resident in California. However, he regarded the question of validity as academic, since even if valid the decision of the 1st August, 1945, was only one factor to be considered. While giving the greatest weight to the California decision, Wells J. felt reluctantly compelled to disagree with the decision, since the welfare of the infant, in his view, required him on the evidence to award the custody of the infant to the Appellant. After referring to what

V, p. 869, ll. 31-41

Wells J. described as "an obvious and flagrant breach of a solemn agreement" by the Appellant not to remove the infant from the United States without the consent of the Respondent; discussing the charges 30

V, p. 869, l. 42—
p. 870, l. 20

made in the Wisconsin proceedings by the Respondent on facts which as stated by her "would not justify their repetition as idle gossip, let alone

V, p. 870, l. 21—
p. 871, l. 1

as serious allegations of fact in litigation"; finding that evidence while not establishing the Respondent's immorality showed "a looseness of public conduct and a lack of personal integrity and dignity which might provide a very unhappy background to the proper upbringing of a child";

V, p. 871, ll. 1-43

mentioning other conduct by the Respondent which showed "a lack of appreciation of any proper standard of public conduct for one of her years", and methods indicating "a sense of drama which had perhaps 40 taken possession of her to the exclusion of any real affection" for the infant; and giving due regard to the fact that the Respondent while under the Appellant's influence had been a good mother to the Appellant's younger children by a former marriage, Wells J. found his faith shaken in the Respondent as a proper person to bring up a boy of seven whose serious education must now commence.

V, p. 872, l. 13—
p. 874, l. 11

14. Wells J. then held that the Appellant was an upright and honest man with family business interests which might redound very markedly in the infant's favour; that the infant had been well cared for under the Appellant's supervision and had a school teacher who impressed Wells J.; 50 and that as the infant's welfare "seems inextricably bound up with the

care, advice and education which his father can now give him . . . his interests will be best served by leaving him where he is in the custody " of the Appellant with a right of access to the Respondent. Wells J. had in the presence of counsel for the parties seen the infant and had inspected the farm (owned by the Appellant and his sister) near Kitchener where the infant was living.

V, p. 873, ll. 25-34

15. The Respondent's appeal to the Court of Appeal for Ontario was dismissed without costs. Robertson C.J.O. would have allowed the appeal because he considered that in the circumstances the courts of Ontario should leave the dispute to the courts of "the country to which these people belong. It is not a question of jurisdiction, but rather one of comity between friendly nations" which, in the Chief Justice's opinion, "requires that the courts of this Province should not exercise their jurisdiction over this infant further than to assure his return to the country to which he belongs." The Chief Justice was of opinion that the Appellant was in contempt of the courts of his own country, in breach of his agreement with the Respondent, and had not removed the infant into Ontario for the infant's benefit, and that therefore there should be an order for the delivery of the infant to the Respondent upon her undertaking to return with the infant to the United States.

V, p. 875

V, pp. 877-888

V, p. 882, l. 39—
p. 883, l. 30

V, p. 884, l. 28—
p. 886, l. 15

V, p. 888, ll. 12-17

16. Hogg and Aylesworth JJ.A. did not think it necessary to consider the validity of the California judgment of 1945, but considered the main problems to be: (1) whether the Supreme Court of Ontario had jurisdiction; (2) if so, should it exercise it, and (3) if so, what in the circumstances in the light of the evidence is best conducive to the welfare and interests of the infant. After reviewing American, English and Canadian authorities they held that the Supreme Court of Ontario had jurisdiction which should be exercised. Their opinion upon a review of the evidence coincided with that of Wells J. that it was in the best interests of the infant (then over seven years of age) that the infant should be left in the custody of the Appellant, and that the circumstances in which the infant came into Ontario could not override the paramount consideration of the infant's welfare.

V, pp. 888-900

V, p. 891, ll. 3-16

V, p. 897, ll. 23-26

V, p. 897, l. 27—
p. 898, l. 14

17. The Respondent appealed to the Supreme Court of Canada. The majority of four judges thought that there was no doubt that the Ontario Court had jurisdiction to determine which of the parties was entitled to the custody of the infant, and that the California judgment, although of great persuasive effect, was not binding on the Ontario Court where the well-established general rule is that in all questions relating to the custody of an infant, the paramount consideration is the welfare of the infant. The majority were, however, of opinion that in the circumstances of this case the Appellant had not become entitled to have the question retried in Canadian courts, and to have them reach a new and independent judgment as to what is best for the infant, since otherwise, by unscrupulous removal from province to province, litigation as to the infant's custody might be prolonged until he attained his majority. If the litigation had been in respect of a child with a normal bona fide residence in Ontario, the majority would have been very hesitant to disturb the conclusion of the trial judge affirmed by the Court of Appeal, but they thought that it is different when one of the parties has obviously brought

V, pp. 903-911

V, p. 907, ll. 7-40

V, p. 908, l. 50—
p. 909, l. 9

- V, p. 909, ll. 19-25
- V, p. 909, l. 47—
p. 910, l. 3
- V, p. 911, ll. 10-21
- V, p. 911, ll. 22-40
- V, pp. 912-931
- V, p. 912, ll. 12-14
- V, p. 912, l. 15—
p. 913, l. 7
- V, p. 913, ll. 36-39
- V, p. 916, l. 27—
p. 917, l. 2
- V, p. 917, ll. 34-48
- V, p. 918, l. 1—
p. 924, l. 18
- V, p. 924, ll. 19-43
- V, p. 924, l. 44—
p. 926, l. 45
- V, p. 926, l. 46—
p. 928, l. 31
- V, p. 928, l. 32—
p. 929, l. 12
- V, p. 931, ll. 32-37
- the child into Ontario to avoid obedience to the judgment of the courts of his own country and in deliberate disregard of his agreement. The majority also doubted whether the judgment under appeal was for the infant's benefit since it would virtually exile him from his own country during his minority and make it substantially impossible for him to spend any time with the Respondent. They thought that Smily J. should have directed the infant to be delivered into the custody of the Respondent on her undertaking to return with him to the United States. In the opinion of the majority, the courts below had not attached sufficient importance to the agreement between the parties and its breach. Accordingly, the appeal was allowed and an order made reciting the Respondent's undertaking forthwith to return with the infant to the United States and to keep the Appellant fully advised as to the infant's whereabouts, and directing that the Respondent have the custody of the infant and her costs throughout.
18. Kellock J., delivering the reasons for judgment of Taschereau J., himself and Fauteux JJ., pointed out that the findings of Wells J. as to where the interests and welfare of the infant lay, could not be seriously challenged, but the Respondent sought to give a greater effect to the California judgment of 1945 than would be given to it by any American state. After reviewing authorities, Kellock J. pointed out that in Ontario alien and subject are entitled to the protection of the same law, which the Respondent had invoked in the present case. The jurisdiction of the Ontario courts relating to infants is statutory and the courts are under a duty to exercise it. Kellock J. thought that the Respondent was seeking an order which the courts had no authority to make except under the Extradition Act or the deportation provisions of the Immigration Act. The court was bound to apply the ordinary law of Ontario to the circumstances of the case, giving due weight to the California decree, without depriving the infant of the protection upon which the infant was entitled to rely. The motive of the Appellant in coming to Ontario to avoid the results of an anticipated judgment as to custody, does not enable the courts to refuse to apply the ordinary law. On principle and authority Kellock J. held that the court ought not, as invited by the Respondent, to shut its eyes to everything but the foreign judgment and the agreement because the parties are aliens. Moreover, Kellock J. set out the reasons of the minority in the Supreme Court for considering that the interlocutory California judgment for divorce in confirming the property settlement agreement between the parties, was confirming only the property provisions. The agreement was a fact to be considered in determining what is in the infant's best interests, as also is the Appellant's conduct in bringing the infant to Ontario notwithstanding the agreement. Kellock J. then examined the facts and expressed his opinion that Wells J. determined the matter on proper principles, whereas the California judgment of 1945, while purporting to change the custody of the infant in his best interests, enumerated findings of doubtful accuracy which would not under the law of Ontario be sufficient grounds for changing the custody. Giving due weight to the California judgment, Kellock J. held it impossible to overrule the concurrent findings of the courts below, made in the light of all the evidence including that in respect of changes in the circumstances since 1945. He therefore thought that the appeal should be dismissed with costs.

19. The Appellant respectfully submits that the views of Smily J., Wells J., Hogg and Aylesworth JJ.A. and Taschereau, Kellock and Fauteux JJ. are more in accord with principle and authority than the reasons of the Chief Justice of Ontario and Kerwin, Estey, Locke and Cartwright JJ. and that the latter, not dissenting from the findings of fact concerning the interests of the infant, were wrong in holding that the Supreme Court of Ontario should have made an order with the object of ensuring the removal of the infant to the United States.

20. The Appellant further submits that the majority of the Supreme Court of Canada fell into serious demonstrable error in taking the view that Wells J. did not find the Respondent to be unfit to have the custody of the infant. The Appellant submits that Wells J. clearly so found, that he considered the reason why the Respondent had been a good mother to the younger members of the Appellant's family was that she then had the benefit of the Appellant's influence and judgment, and that therefore he gave to the Respondent a mere right of weekly access to the infant.

21. The Appellant therefore submits that this appeal should be allowed, and that the judgment of the Supreme Court of Canada should be set aside and the judgment of the Court of Appeal for Ontario restored, and that the Respondent should be ordered to pay the Appellant's costs of the appeal to the Supreme Court of Canada and of this appeal, for the following amongst other

REASONS.

- (1) BECAUSE the courts in Ontario rightly considered the case on its merits, and rightly treated the welfare of the infant as the paramount consideration.
- (2) BECAUSE Wells J. and the Court of Appeal for Ontario rightly found that the welfare of the infant required that custody of the infant be given to the Appellant.
- 30 (3) BECAUSE the reasons of the Chief Justice of Ontario and of the majority of the judges in the Supreme Court of Canada are based on matters which are not relevant to the welfare of the infant and which it was not proper for the courts in Canada to take into consideration.
- (4) BECAUSE the majority of the judges in the Supreme Court of Canada give to the findings of Wells J. regarding the Respondent's fitness to have the custody of the infant a meaning which those findings cannot bear.
- 40 (5) BECAUSE the order of Wells J. was based on sound grounds, and was the proper order.
- (6) BECAUSE of the other reasons given by Smily J., Wells J., the majority of the judges in the Court of Appeal for Ontario, and the minority of the judges in the Supreme Court of Canada.

FRANK GAHAN.

G. H. LOCHEAD.

9. 1951

No. 44 of 1950.

In the Privy Council.

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Appellant

AND

EVELYN McKEE (Plaintiff) *Respondent.*

Case for the Appellant.

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